

CHAVEZ & GERTLER LLP

MARK A. CHAVEZ (Bar No. 90858)
NANCE F. BECKER (Bar No. 99292)
42 Miller Avenue
Mill Valley, California 94941
Telephone: (415) 381-5599
Facsimile: (415) 381-5572
Email: mark@chavezgertler.com
nance@chavezgertler.com

BRAYTON PURCELL LLP

ALAN R. BRAYTON (Bar No. 73685)
PETER B. FREDMAN (Bar No. 189097)
CHARLOTTE E. SCOTT (Bar No. 225581)
222 Rush Landing Road
Novato, CA 94948-6169
Telephone: (415) 898-1555
Facsimile: (415) 898-1247
Email: pfredman@braytonlaw.com

Attorneys for Plaintiffs and all others similarly situated

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CATHERINE GELLIS, individually and on behalf of all others similarly situated,

Plaintiff,

v.

VERIZON COMMUNICATIONS, INC., a Delaware corporation; VERIZON WIRELESS, an unincorporated association; CELLCO PARTNERSHIP, an unincorporated association; and DOES 1-100, inclusive,

Defendants.

Case No. C 07-03679 JSW

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT
VERIZON WIRELESS'S MOTION
TO DISMISS FIRST AMENDED
COMPLAINT PURSUANT TO FED.
R. CIV. P. 12(b)(6)**

Date: November 2, 2007

Time: 9:00 a.m.

Place: Courtroom 2

The Honorable Jeffrey S. White

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ISSUES PRESENTED	2
III.	SUMMARY OF ARGUMENT	2
IV.	FACTS	4
V.	ARGUMENT	5
A.	THE LATE FEE PROVISION IS A LIQUIDATED DAMAGES CLAUSE BECAUSE IT OSTENSIBLY ASSESSES DAMAGES FOR THE CUSTOMER’S BREACH OF THE PROMISE TO PAY ON TIME	5
B.	SECTION 332 DOES NOT PREEMPT CAL. CIVIL CODE SECTION 1671(D) BECAUSE LIQUIDATED DAMAGES CLAUSES ARE “OTHER TERMS AND CONDITIONS,” NOT “RATES”	7
C.	EVEN ASSUMING PREEMPTION ARGUENDO, THE MOTION TO DISMISS FAILS BECAUSE THE PROTECTIONS OF CAL. CIVIL CODE SECTION 1671(D) ARE INCORPORATED INTO THE TERMS OF THE CONTRACT	11
VI.	CONCLUSION	12

TABLE OF AUTHORITIES

Federal Cases

<i>Bastien v. AT&T Wireless Services, Inc.</i> , 205 F.3d 983 (7th Cir.2000).....	9, 10
<i>Boomer v. AT&T Corp.</i> , 309 F.3d 404 (7th Cir.2002).....	10
<i>Brown v. Washington/Baltimore Cellular, Inc.</i> , 109 F.Supp.2d 421 (D.Md. 2000)	6, 7, 8, 9
<i>Esquivel v. Southwestern Bell Mobile Sys., Inc.</i> , 920 F.Supp. 713 (S.D.Tex.1996)	7, 8
<i>Fedor v. Cingular Wireless Corp.</i> , 355 F.3d 1069 (7th Cir.2004).....	10, 12
<i>Fort Vancouver Plywood Co. v. U.S.</i> , 747 F.2d 547 (9th Cir.1984)	12
<i>Gilmore v. Southwestern Bell Mobile Systems, Inc.</i> , 156 F.Supp.2d 916 (N.D.Ill. 2001)	8, 9, 10
<i>In re Ankeny</i> , 184 B.R. 64 (9th Cir.BAP (Cal.)1995).....	12
<i>In re Bubble Up Delaware, Inc.</i> , 684 F.2d 1259 (9th Cir.1982).....	6
<i>In re Comcast Cellular Telecom. Litigation</i> , 949 F.Supp. 1193 (E.D.Pa. 1996)	8
<i>In re Wireless Telephone Federal Cost Recovery Fees Litigation</i> , 343 F.Supp.2d 838 (W.D.Mo.2004).....	10
<i>In re Wireless Telephone Radio Frequency Emissions Products Liability Litigation</i> , 327 F.Supp.2d 554.....	10
<i>Kiefer v. Paging Network, Inc.</i> , 50 F.Supp.2d 681 (E.D.Mich.1999)	9
<i>Metropolitan Life Ins. Co. v. Taylor</i> , 481 U.S. 58 (1987)	9

TABLE OF AUTHORITIES

<i>Nat'l Ass'n of State Utility Consumer Advocates, v. F.C.C.,</i> 457 F.3d 1238 (11th Cir.2006).....	7, 10
<i>Shroyer v. New Cingular Wireless Services, Inc.,</i> ___F.3d ___, 2007 WL 2332068 C.A.9 (Cal.) 2007.....	10
<i>Tenore v. AT & T Wireless Services,</i> 136 Wash.2d 322 (1998)	11
<i>Ting v. AT & T,</i> 319 F.3d 1126 (9th Cir.2003).....	10
<i>TPS Utilicom Services, Inc. v. AT & T Corp.,</i> 223 F.Supp.2d 1089 (C.D.Cal.2002).....	9, 10
Federal Statutes	
47 U.S.C. § 332	<i>passim</i>
47 U.S.C. § 414	7
State Cases	
<i>Action Network, Inc. v. AT&T Broadband of Southern California, Inc.,</i> 135 Cal.App.4th 1023 (2006).....	6
<i>Broadband of Southern California, Inc.,</i> 135 Cal.App.4th 1023 (2006).....	6
<i>Ball v. GTE Mobilnet of California,</i> 81 Cal.App.4th 529 (2000).....	8
<i>Ridgley v. Topa Thrift & Loan Ass'n,</i> 17 Cal.4th 970 (1998).....	6
<i>Spielholz v. Superior Court,</i> 86 Cal.App.4th 1366 (2001)	9
State Statutes	
Cal. Civil Code §1654	11
Cal. Civil Code § 1671(d).....	11, 12

TABLE OF AUTHORITIES

Other Authorities

<i>In Re Truth-In-Billing</i> (2005) 20 F.C.C.R. 6448.....	7, 10
<i>In re Wireless Consumers Alliance</i> (2000) 15 F.C.C.R. 17021	9, 11
<i>Restatement (Second) of Contracts</i> § 356 (1981), Comment A.....	6
<i>Restatement (Second) of Contracts</i> § 356 (1981), Comment C	6

1 **I. INTRODUCTION**

2 Defendants' motion to dismiss confuses "rates" provisions, which reflect charges for
3 services promised under a contract, with liquidated damages provisions, which assess
4 damages for breaches of the contract. Defendants' preemption argument must fail because
5 plaintiff's claims are limited to the latter category.

6 It is a generally applicable precept of contract law that parties to a contract may
7 effectively provide in advance the damages that are to be payable in the event of breach *only*
8 as long as the provision does not disregard the principle of compensation. Generally
9 speaking, a provision liquidating the damages for a breach is valid unless the party seeking to
10 invalidate it can prove it was unreasonable in relation to the potential damages under the
11 circumstances existing at the time the contract was made.

12 California law provides enhanced protections for consumers against excessive
13 liquidated damages clauses. In California consumer contracts, liquidated damages clauses
14 are presumptively void, and can only be validated by a showing that the provision in question
15 (1) represents a reasonable endeavor to estimate actual damages resulting from breach and
16 (2) when, from the nature of the case, it would be impracticable or extremely difficult to fix
17 the actual damage. This rule is codified in California Civil Code section 1671(d).

18 The liquidated damages clause at issue here provides that Verizon Wireless may (but
19 only "to the extent permitted by the law of the state of the billing address [of the customer]")
20 charge the greater of \$5 or 1.5% per month as compensatory damages for the breach that
21 occurs when a customer fails to pay a balance in full by the date stated on the bill. As a
22 result of this clause, plaintiff was charged the \$5 minimum fee for paying a \$131 Verizon
23 Wireless bill nine days late. This 3.8% charge for nine days represents an annual percentage
24 rate (APR) of about 154%.

25 Plaintiff alleges that this clause, and the \$5 minimum charge in particular, is void as a
26 penalty under California law. The First Amended Complaint (FAC) alleges that defendants'
27 collection of these penalties *both* violates California law *and* breaches its contracts with her
28 and thousands of similarly situated Californians. In addition to the contract claim, she asserts

1 related causes of action arising out of California consumer protection statutes and common
2 law.

3 4 **II. ISSUE PRESENTED**

5 The issue presented is whether plaintiff's claims are preempted by section
6 332(c)(3)(A) (hereafter, "section 332") of the Federal Communication Act (FCA), which
7 states:

8 [N]o State or local government shall have any authority to regulate the entry
9 of or the rates charged by any commercial mobile service or any private
10 mobile service, except that this paragraph shall not prohibit a State from
regulating the other terms and conditions of commercial mobile services.

11 47 U.S.C. § 332(c)(3)(A)

12 Specifically, defendants assert that the preemptive force of section 332's prohibition
13 of state regulation of "rates charged" prevents the application of California law to the
14 following provision of plaintiff's mobile services contract:

15 Payment is due in full as stated on your bill. IF WE DON'T RECEIVE
16 PAYMENT IN FULL WHEN DUE, WE MAY, TO THE EXTENT
17 PERMITTED BY THE LAW OF THE STATE OF THE BILLING
18 ADDRESS WE HAVE ON FILE FOR YOU AT THE TIME, CHARGE A
19 LATE FEE OF UP TO 1.5 PERCENT A MONTH (18 PERCENT
ANNUALLY), OR A FLAT \$5 A MONTH, WHICHEVER IS GREATER,
ON UNPAID BALANCES.

20 FAC Ex. B, pg. 5.

21 22 **III. SUMMARY OF ARGUMENT**

23 Defendants' motion relies on the false premise that the provision at issue is not a
24 liquidated damages or penalty clause; that accepting late payments is a "service" that
25 Verizon Wireless provides to its customers; and that late fees are the "rates" it charges for
26 that service. This premise is refuted by the plain language of the provision itself, and more
27 so when read in the context of the contract as a whole and the related factual allegations of
28

1 the FAC. The fact of the matter is that the premise is flat-out facetious: defendants' own
2 bills describe late fees as "liquidated damages".¹

3 Recognizing this as a liquidated damages provision is determinative. Liquidated
4 damages provisions are *by definition* distinct from rate provisions. Whereas the latter reflect
5 charges for services rendered under a contract, the former assess damages for breaches of the
6 contract. While Congress may have completely preempted claims relating to "rates," it has
7 left regulation of other "terms and conditions" (specifically including "consumer protection
8 matters") to the states. California's prohibition of excessive liquidated damages provisions
9 in consumer contracts falls squarely into the latter category.

10 The argument that prohibiting excessive liquidated damages will result in rate
11 increases is anathema to the principle that liquidated damages must be compensatory in
12 nature: the late fees should roughly equal damages incurred as a result of the lateness.
13 Plaintiff does not seek to prohibit Verizon Wireless from imposing late fees, she merely
14 seeks to enforce the legal requirement that such fees reasonably approximate its damages. In
15 any event, Congress did not preempt all claims that could possibly influence rates, but only
16 those that involve the reasonableness or lawfulness of the rates themselves. All of the
17 authorities that have looked at the issue agree that state regulation of late fees and other
18 liquidated damages provisions is not preempted by section 332.

19 The policy behind section 332 also supports this straightforward conclusion. Even
20 assuming *arguendo* that preventing Verizon Wireless from assessing excessive liquidated
21 damages could legitimately impact the rates it charges for its services, allowing it to do so
22 does not further the Congressional intent of allowing market forces to determine rates. On
23 the contrary, requiring wireless providers to rely on up-front billing practices will only
24 enhance competition.

25 _____
26 ¹ Judicial Notice is requested of plaintiff's September 13, 2006 Verizon Wireless billing
27 statement, submitted herewith, which reads in relevant part: "A late payment charge applies
28 for unpaid balances. The charge is the greater of \$5 or 1.5% per month or as permitted by
law, and are *liquidated damages*, not a penalty. Our records indicate your account is past
due. Please send payment now to avoid service disruption."

1 Finally, even assuming preemption *arguendo*, defendants' motion to dismiss fails
 2 because the subject late fee provision incorporates California liquidated damages law into
 3 the terms of the contract between plaintiff and Verizon Wireless. If this is an invalid
 4 penalty clause under California law, then it is inapplicable as a matter of contract between
 5 the parties even if not void as a matter of state regulatory law.

6 7 **IV. FACTS**

8 When plaintiff Catherine Gellis entered into a new two-year agreement with Verizon
 9 Wireless, she executed a receipt-like short form agreement, which incorporated by reference
 10 a *Verizon Wireless Customer Agreement Terms and Conditions* document (the "CA"), which
 11 incorporated by reference her *Calling Plan*. FAC Ex. A; FAC, ¶¶12-14. Thus the
 12 overarching contract between plaintiff and Verizon Wireless was formed and documented.

13 The CA itself is a dense, nine-page, adhesion contract directed primarily at
 14 establishing the customers' obligations and limiting those of Verizon Wireless. FAC Ex. B.
 15 Pricing issues are deferred to the *Calling Plan*. *Id.*, pg. 1. Where the CA uses the term
 16 "rates" it does so in the ordinary fashion. For example, it explains that "[t]here may be extra
 17 charges ... and higher *rates* for roaming calls, depending on your calling plan." *Id.*, pg. 4
 18 (emphasis added).

19 The subject liquidated damages clause is one of several provisions of the CA that sets
 20 forth Verizon Wireless's rights in the event customers fail to perform their obligations under
 21 the contract. FAC Ex. B. The vast majority of charges are billed in advance. *Id.*, pg. 4; see
 22 FAC, ¶¶16-17. The customer has no right to carry forward a balance: "Payment is due in full
 23 as stated on [the] bill." FAC Ex. B, pg. 5. In addition to the late fees, Verizon Wireless
 24 reserves the right to suspend or terminate service if the customer pays "late more than once
 25 in any 12 months". *Id.*, pg. 6. If service is suspended, Verizon Wireless charges an
 26 unspecified reconnection fee.² *Id.*, pg. 4. If service is terminated, it charges an early
 27

28 ² Verizon Wireless currently charges a reconnection fee of \$15 per phone number.

1 termination fee of up to \$175 per phone number. *Id.*, pg. 2. If the customer fails to pay the
 2 amounts charged, all additional costs of collection are charged to the customer.³ *Id.*, pg. 5.

3 When plaintiff neglected to pay her December bill by the specified due date, the next
 4 month's bill demanded immediate payment of all charges for *both* months plus a \$5 late
 5 charge. FAC, ¶¶16-19. Plaintiff complied by paying the entire balance immediately after
 6 receiving said January bill. *Id.*, ¶19. Thus plaintiff paid \$5 as compensation for paying the
 7 \$131 December bill nine days after the specified due date, and Verizon Wireless obtained
 8 payment of the \$131 January bill about twenty-one days in advance of when it would
 9 otherwise have been due. *Id.*, ¶20.

10 Plaintiff alleges that these bills were issued automatically in the ordinary course of
 11 defendants' business, and that no additional human effort or piece of paper was expended by
 12 them in collecting these sums. *Id.*, ¶¶21-22. She further alleges that Verizon Wireless does
 13 not extend credit to its customers and would not have allowed her to carry any significant
 14 balance for any significant length of time without exercising its contractual right to suspend
 15 and/or terminate service and collect reconnection and/or early termination fees therefore.
 16 *Id.*, ¶23.

17 18 **V. ARGUMENT**

19 **A. The Late Fee Provision Is A Liquidated Damages Clause Because It** 20 **Ostensibly Assesses Damages For The Customer's Breach Of The Promise To** 21 **Pay On Time**

22 The concepts relating to liquidated damages provisions and limitations thereon are
 23 matters of generally applicable contract law:

24 *Liquidated damages or penalty.* The parties to a contract may effectively
 25 provide in advance the damages that are to be payable in the event of breach as
 26 long as the provision does not disregard the principle of compensation. ...

27
 28 ³ Here again the CA self-limits defendants' collection rights to those allowed under "the law
 of the state of the billing address [of the customer]" at the time the account is sent to
 collections. FAC Ex. B, pg. 5.

1 However, the parties to a contract are not free to provide a penalty for its
 2 breach. The central objective behind the system of contract remedies is
 3 compensatory, not punitive. Punishment of a promisor for having broken his
 4 promise has no justification on either economic or other grounds and a term
 providing such a penalty is unenforceable on grounds of public policy.

5 *Restatement (Second) of Contracts* § 356 (1981), Comment A; see also *In re Bubble Up*
 6 *Delaware, Inc.*, 684 F.2d 1259, 1262 (9th Cir.1982) (U.S. law).

7 Regardless of its validity, or what choice of law is applied, the late fee provision at
 8 issue here must be construed as a liquidated damages clause because it is triggered by the
 9 breach of the promise to pay on time and purports to assess damages therefore. *Ibid.* Most
 10 conventional late fee provisions are liquidated damages provisions. *Ridgley v. Topa Thrift &*
 11 *Loan Ass'n*, 17 Cal.4th 970, 978 (1998) (loan late fees); *Action Network, Inc. v. AT&T*
 12 *Broadband of Southern California, Inc.*, 135 Cal.App.4th 1023, 1028 (2006) (internet late
 13 fee); *Brown v. Washington/Baltimore Cellular, Inc.*, 109 F.Supp.2d 421, 423 (D.Md. 2000)
 14 (cellular late fee).

15 Verizon Wireless suggests that its late fee provision should be construed instead as an
 16 option it offers its customers to carry balances forward. “Sometimes parties attempt to
 17 disguise a provision for a penalty by using language that purports to make payment of the
 18 amount an alternative performance under the contract.” *Restatement (Second) of Contracts* §
 19 356 (1981), Comment C. In these “disguised penalty” cases, “a court will look to the
 20 substance of the agreement to determine whether this is the case or whether the parties have
 21 attempted to disguise a provision for a penalty that is unenforceable”. *Ibid.*; see also *Ridgley*,
 22 *supra*, 979.

23 In this case, however, there is no pretense even of alternative performance. Verizon
 24 Wireless itself describes the late fees as “liquidated damages”. See Request For Judicial
 25 Notice and Footnote 1 hereto. The CA is unambiguous that the failure to pay on time
 26 subjects the customer to escalating remedies. FAC, Ex. B, at pg. 5. When a payment is late,
 27 the entire balance becomes due immediately upon delivery of the next bill. FAC, ¶19.
 28 Verizon Wireless does not extend credit or allow its customers to carry forward balances

1 month after month. *Id.*, ¶23. Therefore this late fee provision is a liquidated damages provision.

3 **B. Section 332 Does Not Preempt Cal. Civil Code Section 1671(d) Because**
 4 **Liquidated Damages Clauses Are “Other Terms And Conditions,” Not**
 5 **“Rates”**

6 Late fee provisions, in particular, and liquidated damages provisions, in general, are
 7 not preempted by section 332 because they are “other terms and conditions,” not “rates”
 8 provisions. *Brown v. Washington/Baltimore Cellular, Inc.*, *supra*, 423 (*Brown*) (late fees);
 9 *Esquivel v. Southwestern Bell Mobile Sys., Inc.*, 920 F.Supp. 713 (S.D.Tex.1996) (*Esquivel*)
 10 (early termination fees); see also *In Re Truth-In-Billing* (2005) 20 F.C.C.R. 6448, 6465 (“the
 11 neutral application of state contractual ... laws [is] not preempted by section 332.”), 6476
 12 (“we tentatively conclude that the line between the Commission's jurisdiction and states'
 13 jurisdiction over carriers' billing practices is properly drawn to where states only may enforce
 14 their own generally applicable contractual and consumer protection laws, albeit as they apply
 15 to carriers' billing practices”), vacated on other grounds by *Nat'l Ass'n of State Utility*
 16 *Consumer Advocates, v. F.C.C.*, 457 F.3d 1238 (11th Cir.2006) (modified on reh'g, 468 F.3d
 17 1272 (11th Cir.2006)) (*NASUCA*); 47 U.S.C. § 414 (“Nothing in [the chapter containing
 18 section 332] shall in any way abridge or alter the remedies now existing at common law or
 19 by statute, but the provisions of this chapter are in addition to such remedies.”)

20 In *Brown*, a class action brought by wireless telephone customers challenging late
 21 fees, “the question facing the court [was] whether late fees constitute ‘rates charged’ or
 22 ‘other terms and conditions’ of wireless telephone service.” *Id.*, 423. Holding that “late fees
 23 are a form of liquidated damages for failure to pay bills on time,” *Brown* concluded:

24 [L]ate fees are not included in “rates” of service, but rather are part of the
 25 “other terms and conditions” of service. While rates of service reflect a charge
 26 for the use of cellular phones, late fees are a penalty for failing to submit
 27 timely payment. Defendants argue that late fee charges are completely
 28 preempted because a reduction in late fee charges will result in an increase in
 rates. However, any legal claim that results in an increased obligation for
 Defendants could theoretically increase rates. For example, a claim of false
 advertising could lead to an increased obligation to notify customers of

1 charges, which could in turn lead to an increase in rates. Congress did not
2 preempt all claims that would influence rates, but only those that involve the
reasonableness or lawfulness of the rates themselves.

3 *Ibid.*

4 In *Esquivel*, a class action brought by wireless telephone customers challenging early
5 termination fees, the “Court [was] persuaded that the liquidated damage provision [was] a
6 ‘term and condition’ of the agreement rather than a rate.” *Id.*, 715. In reaching this
7 conclusion, *Esquivel* held:

8 [Section 332] specifically declines to prohibit the states from regulating terms
9 and conditions. The congressional history indicates that the phrase “terms and
10 conditions” was meant to include such matters as customer billing information
and practices and billing disputes, “and other consumer protection matters.”
11 Plaintiffs’ suit is invoking the common law of Texas designed to protect
12 consumers from excessive liquidated damages provisions that are tantamount
to penalties.

13 *Id.*, 715-716.

14 The reasoning of *Brown* and *Esquivel* applies equally here. Neither case has any
15 negative citing references. On the contrary, even cases drawing the line in favor of
16 preemption cite *Esquivel* as a counter-example of monetary charges that are not preempted
17 because they “have only a tangential relationship to the actual rates for service paid by
18 cellular customers.” *Ball v. GTE Mobilnet of California*, 81 Cal.App.4th 529, 539 (2000)
19 (section 332 preempts claims challenging billing for non-communication time but not claims
20 for inadequate disclosure of such billing practices); *In re Comcast Cellular Telecom.*
21 *Litigation*, 949 F.Supp. 1193, 1201 (E.D.Pa. 1996) (complete preemption of challenges to
22 billing for non-communication time).

23 *Gilmore v. Southwestern Bell Mobile Systems, Inc.*, 156 F.Supp.2d 916 (N.D.Ill.
24 2001) (*Gilmore*) – the focal point of defendants’ argument that late fees are rates within the
25 meaning of section 332 – itself cites *Brown*’s contrary conclusion regarding late fees without
26 disapproval. *Id.*, 923. In *Gilmore*, plaintiff alleged that a wireless provider breached its
27 contract with him when it began charging a Corporate Account Administration Fee that was
28 not provided for in their contract. *Id.*, 919. *Gilmore* held that section 332 completely

1 preempted this claim because the Fee was a charge for wireless telephone services and, thus,
 2 was a “rate” under. *Id.*, 925. In a footnote to its *Brown* citation, *Gilmore* posited:

3 It need not be decided if *Brown* correctly construes the meaning of “rates” as
 4 used in § 332(c)(3)(A). Plaintiff does not allege that the Fee was a charge for
 something other than provision of cellular telephone services.

5 *Id.*, 923.

6 Defendants’ thus face the logical incongruity that *Gilmore* specifically
 7 declined to reach the proposition for which they cite it. Moreover, *Gilmore*, along
 8 with *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983 (7th Cir.2000) (*Bastien*)
 9 which it followed, demonstrate that even the far outer limits of section 332
 10 preemption never purported to classify late fees as rates. *Bastien* held that even fraud
 11 and false advertising claims regarding service quality were completely preempted by
 12 section 332 because any challenge to service quality necessarily attacked the
 13 reasonableness of the rates charged for the service. *Bastien*, 984; *Gilmore*, 922. But,
 14 in doing so, *Bastien* relied substantially on filed-rate doctrine analysis that is
 15 inapplicable to section 332 cases. See discussions in *Spielholz v. Superior Court*, 86
 16 Cal.App.4th 1366, 1379-1380 (2001) (disagreeing with *Bastien* and finding consumer
 17 claims regarding service quality issues not preempted by section 332) and *In re*
 18 *Wireless Consumers Alliance* (2000), 15 F.C.C.R. 17021, at FN 47 (“[Wireless]
 19 providers have engendered much confusion over the issue of the applicability of the
 20 filed rate doctrine in cases concerning the preemptive effect of Section 332 ...
 21 Section 332 cases arise under a totally different regulatory regime”), ¶¶18-20, ¶28.⁴

22 By 2002, the “majority of district courts outside the Seventh Circuit [had
 23 found against] complete preemption under a more searching analysis of the

24
 25 ⁴ Defendants here cite *Kiefer v. Paging Network, Inc.*, 50 F.Supp.2d 681 (E.D.Mich.1999)
 26 (*Kiefer*), which is not a section 332 or preemption case. *Kiefer* held that the FCC had
 27 primary jurisdiction over plaintiff’s 47 U.S.C. § 201(b) claim and stayed the action pending
 28 referral to the FCC. *Id.*, 686. That is not an issue here. *Metropolitan Life Ins. Co. v. Taylor*,
 481 U.S. 58, 63, (1987) (cause of action arises under federal law only when the plaintiff’s
 well-pleaded complaint raises issues of federal law).

1 Congressional intent underlying [section 332]”. *TPS Utilicom Services, Inc. v. AT &*
 2 *T Corp.*, 223 F.Supp.2d 1089, 1098-1100 (C.D.Cal.2002); *In re Wireless Telephone*
 3 *Federal Cost Recovery Fees Litigation*, 343 F.Supp.2d 838, 850 (W.D.Mo.2004).
 4 Subsequently, the *Bastien* ruling was “limited by *Fedor v. Cingular Wireless Corp.*,
 5 355 F.3d 1069, 1072-74 (7th Cir.2004), which held that state law claims for breach of
 6 contract, consumer fraud, and unjust enrichment based on allegations of improper
 7 billing fall outside of the scope of section 332(c)(3)(A) and thus are not preempted.”
 8 *In re Wireless Telephone Radio Frequency Emissions Products Liability Litigation*,
 9 327 F.Supp.2d 554, 565 (D.Md.2004).⁵

10 Defendants’ reliance on *NASUCA* contradicts their reliance on *Gilmore*.
 11 *NASUCA* held that the Federal Communications Commission (FCC) exceeded its
 12 authority when it declared, in *In Re Truth-In-Billing*, *supra*, that section 332
 13 preempted states from prohibiting the imposition of extraneous line-item fees and
 14 surcharges – like the Corporate Account Administration Fee in *Gilmore*. *NASUCA*,
 15 1243-44, 1247. So, whereas *Gilmore* held that section 332 completely preempted
 16 even a customer’s state contract claim that he was charged a line-item fee he never
 17 agreed to, *NASUCA* holds that section 332 allows states to prohibit such line-item
 18 billing practices whether the customer agrees to the charge or not. *Id.*, 1254-55.
 19 *NASUCA* stands for the proposition that wireless providers’ rights to ultimately
 20 control the aggregate rates they charge for their services do not implicate a corollary
 21 right to be free of regulation prohibiting billing practices that obscure the aggregate
 22 rates in a sea of extraneous fees and surcharges. *Id.*, 1257-58.

23
 24 ⁵ Outside of the section 332 context, the conflict between the Ninth and Seventh Circuits
 25 concerning FCA preemption in the post-tariff telecommunications environment further
 26 inures to the benefit of plaintiff in this case. In *Boomer v. AT&T Corp.*, 309 F.3d 404 (7th
 27 Cir.2002), the Seventh Circuit held that the FCA preempts state-law challenges to the
 28 enforcement of class arbitration waivers. *Id.*, 423. In *Ting v. AT & T*, 319 F.3d 1126 (9th
 Cir.2003), however, the Ninth Circuit reached the opposite conclusion. *Id.*, 1135; see also
Shroyer v. New Cingular Wireless Services, Inc., --- F.3d ---, 2007 WL 2332068 C.A.9 (Cal.)
 2007 (no Federal Arbitration Act preemption of state-law challenges to the enforcement of
 class arbitration waivers).

1 Congress could have, if it desired, completely preempted state law by stating
 2 that § 332(c)(3)(A) would preempt all state laws that related to the rates
 3 charged, instead of providing for preemption only where state law regulates
 4 “the entry of or the rates charged” ... Compare ERISA's broader preemption
 5 clause which states that the law “shall supersede any and all State laws insofar
 as they may now or hereafter relate to any employee benefit plan....”
 29 U.S.C. § 1144(a).

6 *Tenore v. AT & T Wireless Services*, 136 Wash.2d 322, 338, FN 71 (1998); *In re Wireless*
 7 *Consumers Alliance, supra*, at 7036 (“*Tenore* and similar cases are more persuasive than
 8 those cases upholding preemption”).

9 Nothing in the text of section 332 (or anywhere else) supports the assertion that
 10 Congress intended to preempt the states from enforcing their generally applicable contract
 11 and consumer protection laws like California Civil Code section 1671(d). *Ibid.* Moreover,
 12 such preemption would be inconsistent with the underlying Congressional intent of allowing
 13 market forces to determine rates. “If wireless providers are to conduct business in a
 14 competitive marketplace, and not in a regulated environment, then state contract and tort
 15 law claims should generally be enforceable in state courts.” *In re Wireless Consumers*
 16 *Alliance, supra*, at 17034. To the extent prohibiting wireless providers from assessing
 17 excessive liquidated damages might impact rates, requiring billing practices that rely on up-
 18 front rates (as opposed to covert fees) facilitates the fair and transparent marketplace
 19 competition that Congress seeks.

20 **C. Even Assuming Preemption, Arguendo, The Motion To Dismiss Fails**
 21 **Because The Protections Of Cal. Civil Code Section 1671(d) Are**
 22 **Incorporated Into The Terms Of The Contract**

23 Defendants’ preemption argument fails to account for the fact that California’s
 24 limitations on liquidated damages are incorporated by reference into the late fee provision of
 25 the contract applicable to California residents. FAC Ex. B, pg. 5 (“IF WE DON’T
 26 RECEIVE PAYMENT IN FULL WHEN DUE, WE MAY, TO THE EXTENT
 27 PERMITTED BY LAW OF THE STATE OF THE BILLING ADDRESS WE HAVE ON
 28 FILE FOR YOU AT THE TIME, CHARGE A LATE FEE OF UP TO...”); see also *Id.*, pg.
 9 (“Except to the extent we’ve agreed otherwise in the provisions on late fees, collection

costs, and arbitration, this agreement and disputes covered by it are governed by the laws of the state of the encompassing the area code assigned to your wireless phone number when you accepted this agreement, without regard to the conflicts of laws and rule of that state.”)

The contractual language is plain, and any ambiguity must be interpreted against Verizon Wireless as the drafter. Cal. Civil Code § 1654; *In re Ankeny*, 184 B.R. 64, 70 (9th Cir.BAP (Cal.)1995) *Fort Vancouver Plywood Co. v. U.S.*, 747 F.2d 547, 553 (9th Cir.1984). The manifest intent to incorporate California’s limitations on liquidated damages into the late fee provision is further evidenced by contrasting provisions elsewhere in the CA. For example, the provision that deals with the early termination fees utilizes a generally applicable “to the extent permitted by law” disclaimer. *Id.*, pg. 2 (“The Early Termination Fee applies only to the extent permitted by law”).

Accordingly, Verizon Wireless promised not to impose late fees that violate California Civil Code section 1671(d) regardless of its applicability otherwise. The FAC alleges that defendants systematically breach this promise. Even assuming preemption *arguendo*, plaintiff’s breach of contract claim survives this motion because nothing in section 332 permits Verizon Wireless to breach the contractual terms it agreed to. *Fedor v. Cingular Wireless Corp.*, *supra*, 1074. The breach of contract claim itself supports each of the related consumer protection and common law claim in the FAC. E.g., FAC, ¶34(a) (CLRA violation for “representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve”); FAC, ¶41 (UCL violation based on deceptive practices because Verizon Wireless “misrepresents that it will abide by California law with respect to the imposition of late fees on persons with California billing addresses”).

VI. CONCLUSION

Defendants’ motion to dismiss based on section 332 preemption must be denied.

Dated: September 14, 2007

CHAVEZ & GERTLER LLP
BRAYTON PURCELL LLP

By: /s/
Peter B. Fredman
Attorneys for Plaintiff